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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

BATTLES FARM COMPANY, et al.,

Petitioners,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States is immune from liability for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), when the government opposes two related claims by taking a substantially justified position as to one of the claims, but a substantially unjustified position as to the other, resulting in significant liability on the merits.

2. Whether the standards set forth in Hensley v. Eckerhart, 461 U.S. 424 (1983), govern the calculation of fees under the Equal Access to Justice Act.

3. Whether a district court award of attorney's fees under the Equal Access to Justice Act is subject to de novo review by the court of appeals to the extent that that court is free to overturn the award on a theory of "substantial justification" that the government itself never advanced.

4. Whether the award of fees under the Equal Access to Justice Act by the district court below should have been affirmed.

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Petitioners Battles Farm Company et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia

Circuit entered in this case on December 12, 1986.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 806 F.2d 1098. The opinion of the district court (App. 15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1986. A timely petition for rehearing was denied on March 3, 1987 together with a suggestion for rehearing en banc. (App. 47a, 48a). Chief Judge

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1. The following parties appeared in the proceedings below: plaintiffs Battles Farm Company, Bay Village Company, Cummins Tower Company, and Southfield Gardens Company, each of which is a Massachusetts limited partnership; and defendant Samuel R. Pierce, Jr., Secretary of Housing and Urban Development.

Wald, Judge Mikva, and Judge Robinson dissented (App. 50a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in relevant part:

> "(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

RELATED CASES

This case is related to two other cases in which petitions for a writ of certiorari are pending before the Court: Dubose v. Pierce, 761 F.2d

913 (2d Cir. 1985), petition for certiorari pending, No. 85-516 ("Dubose"); and Underwood v. Pierce, 761 F.2d 1342 (9th Cir. 1985), modified, 802 F.2d 1107 (9th Cir. 1986), petition for certiorari pending, No. 86-1512 ("Underwood").

STATEMENT

1. The petitioners (the "Battles Farm projects") are the owners of four lower-income housing projects built pursuant to Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1. They brought suit against the Secretary of Housing and Urban Development ("HUD") for failure to implement an "operating subsidy" program enacted by Congress to assist Section 236 projects. Under the program, subsidies to cover increased operating

expenses could be paid from a self-replenishing fund called the "excess rental reserve fund." In addition, subsidies could be paid from monies appropriated by Congress to satisfy long-term subsidy contracts entered into by HUD in the exercise of so-called "contract authority."

HUD's refusal to implement the program led to numerous lawsuits, including Dubose, Underwood, and Battles Farm. See Petition for Writ of Certiorari at 3-5, Dubose v. Pierce, No. 85-516, for a more detailed discussion of the operating subsidy program and the litigation resulting from HUD's refusal to implement the program. By March 1976, when the Battles Farm projects filed suit, nine district court decisions had unanimously held that the

operating subsidy program was mandatory and that HUD was required to pay subsidies to eligible projects at least from the excess rental reserve fund.

2. Despite these adverse rulings, HUD continued to resist each suit as it was filed. In each case, the agency argued that it had discretion not to implement the program because (1) HUD could not make operating subsidy payments directly from the reserve fund without obligating contract authority and (2) HUD had discretion whether to use its contract authority for this purpose or for other subsidies.

In Battles Farm, the projects responded that it was mandatory for HUD to provide operating subsidies, and that these subsidies could be paid directly from the reserve fund without the

exercise of contract authority. Alternatively, they argued that HUD's refusal to exercise contract authority was an abuse of discretion. Prevailing on the first theory, but not on the second, the Battles Farm companies ultimately recovered over $1.1 million in subsidies. These subsidies assured the survival of projects that had been in default or on the brink of default as a result of mounting operating expenses.

3. The district court thereafter awarded the Battles Farm projects attorney's fees under the Equal Access to Justice Act ("EAJA"), which mandates the award of fees to small businesses that prevail in litigation against the United States, unless the government can show that "the position of the United States was substantially

justified . . . ." 28 U.S.C. § 2412(d)(1)(A). The court concluded, first, that HUD's position on "the central issue" in the litigation -- "whether HUD had discretion not to implement the operating subsidy program" -- lacked substantial justification "because (1) HUD's position had no reasonable basis, (2) was consistently rejected by the courts, and (3) was ultimately abandoned by HUD." App. at 21a. Then, applying the standards of Hensley v. Eckerhart, 461 U.S. 424 (1983), the court held that no deduction should be made for time spent on the unsuccessful contract argument, since that was a related claim that could not practically or properly be fractionated from the main issue. App. at 26a-27a.

The court of appeals, in an opinion by Judge Silberman, reversed. The court did not disturb the district court's conclusions that HUD's position on the central issue had been unreasonable, or that the contract argument was integrally related to the main claim on which plaintiffs prevailed. Instead, the court reasoned that since HUD properly defended against the contract claim, and "might well have jeopardized [its] position on [that] . . . claim had [it] conceded the rental reserve fund claim," its positions considered in their entirety were reasonable. App. at 11a.

HUD had not defended against the award of attorney's fees on this ground either in the district court or

in its briefs to the court of appeals.[2] On the contrary, HUD maintained that it had opposed all reserve fund claims despite nine adverse district court decisions simply because the issue had not been definitively resolved against the agency at the appellate level. See, e.g., Br. for the Appellant at 20-21, Battles Farm Co. v. Pierce, Nos. 85-5945, etc. (D.C. Cir.). At the same time, HUD viewed the contract claim as "an 'easily compartmentalized,' discrete claim." Id. at 28. Thus, HUD itself made clear that the contract claim had had no effect at all on its decision to defend against the reserve fund claim.

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2. Judge Silberman raised the issue for the first time at oral argument in a question posed to petitioners' counsel.

If HUD had asserted, in accordance with the court of appeals' supposition, that the agency had opposed the reserve fund claim for fear of jeopardizing the defense to the contract claim, the projects could and would have introduced contrary evidence. Apart from the inconsistent statements in the agency's own briefs, HUD had consistently rejected demands for the subsidy even before any party had asserted a long-term contract claim. Moreover, as the district court found (App. at 21a), the mandatory nature of the operating subsidy program had been the "central issue" in this litigation, not the projects' requests for subsidy contracts. Those requests had been a subsidiary aspect of the litigation.

REASONS FOR GRANTING THE WRIT

1. We concur with the Solicitor General that "[g]iven the enormous volume of EAJA litigation, . . . errors committed by the court of appeals are of considerable practical significance and warrant review by this Court, which has yet to consider a case involving the construction of [the] EAJA." Petition for a Writ of Certiorari at 8, Pierce v. Underwood, No. 86-1512 ("Underwood Petition"). Indeed, as we show below, no better illustration of the need for review exists than this case, certainly when coupled with Underwood and Dubose.

According to the court below, the government under the EAJA may properly resist a claim as to which its position is unjustified when that might

assist its defense on a related claim as to which its position is justified. This ruling conflicts with the Third Circuit's decision in Goldhaber v. Foley, 698 F.2d 193 (3d Cir. 1983); is manifestly at odds with the central objectives of the EAJA of discouraging and providing compensation for unreasonable behavior by the government; contravenes this Court's treatment of similar issues under related fee-shifting statutes, as set forth in Hensley v. Eckerhart, supra; and is calculated to cause great harm, since litigation frequently involves multiple claims or defenses and the holding below "may be relied on widely by government lawyers in the future." Statement of Chief Judge Wald, dissenting from denial of rehearing en banc (App. at 51a-52a).

Furthermore, Battles Farm, Underwood, and Dubose require reconciliation. Each of these cases was originally brought to vindicate the entitlement of Section 236 projects and their tenants to operating subsidies. (Battles Farm and Underwood actually were heard and decided together in the D.C. District Court. They also were heard together in the court below until Underwood was transferred to the Ninth Circuit for settlement purposes.) In each of the cases the district court then awarded the plaintiffs attorney's fees under the EAJA after concluding that HUD's position in the litigation had not been substantially justified.

Nonetheless, on appeal, the three circuit courts adopted divergent approaches, with one (the Underwood

court) affirming and the other two (the Battles Farm and Dubose courts) overturning the fee awards. What the Solicitor General has said in seeking certiorari in Underwood is equally true here: This conflict "illustrates the lower courts' general inability to develop clear guidelines to govern the resolution of EAJA disputes -- a conflict sharply exemplified here, where [different] courts of appeals have reached contrary conclusions on essentially identical facts." Underwood Petition at 9. This Court should resolve the conflict.

2. In Goldhaber v. Foley, 698 F.2d 193 (3d Cir. 1983), the Third Circuit held that the fact that the government reasonably defended against one claim does not immunize it from a

fee award under the EAJA if its position on another claim was not substantially justified. "We would find it incongruous," the court explained, "to deny fees to a prevailing party who identifies and defeats one unreasonable government position simply because the government has substantial justification for defending a second claim in the same action. If fees were denied to a prevailing party in such a circumstance, the purpose of the Act would be thwarted . . . ." Id. at 197.

Eschewing this approach, the D.C. Circuit has condoned the government's adoption of unreasonable positions at least so long as those positions somehow advance the government's cause in reasonably defending against related claims. As a

primer on litigation tactics, this holding is dubious at best, since we doubt that it ever pays for any litigant, public or private, to advance an unreasonable argument in an effort to bolster a reasonable one. More importantly, this ruling undermines the central objective of the EAJA -- to hold the government, if anything, to a higher standard than private parties by encouraging it at all times to refrain from taking unjustified positions. As the D.C. Circuit itself previously recognized in Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983) (emphasis added), "government counsel [should be induced] to evaluate carefully each of the various claims they might make in a particular controversy, and to assert only those that are substantially

justified"; that approach will result in a "more sensitive and effectual promotion of the objectives of the EAJA."[3] Accord, Goldhaber v. Foley, supra, 698 F.2d at 197-98.

Furthermore, the Battles Farm holding imposes a substantial burden on small businesses confronted with an unjustified government position. Under the D.C. Circuit's ruling, if the private litigant raises a related claim as to which the government's defense is

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3. On the Battles Farm projects' suggestion for rehearing en banc, Judge Silberman attempted to reconcile his opinion with Spencer by drawing distinctions among claims, affirmative defenses, and other types of defenses. App. at 53a. We are baffled by this discussion. The purported distinctions misread Spencer, see 712 F.2d at 556-57, and have no logic under the statute.

reasonable, whether or not correct, he forgoes the award of any EAJA fees regardless of how little work he performs on the related claim and how successful he is overall in the suit. In this case, for example, the Battles Farm projects desperately needed operating subsidies and filed suit because HUD refused to pay them from the excess rental reserve fund despite numerous adverse court orders in other cases. It was entirely reasonable for the projects to add the contract claim to their complaint because it responded separately to HUD's argument that the agency could not pay subsidies from the reserve fund without obligating contract authority. There is no sound basis for penalizing the projects for having taken this action by a forfeiture of all fees,

especially when the contract claim was a subsidiary issue and the projects achieved extraordinary overall success in their suit.

3. The Solicitor General has stated that "EAJA litigation would be greatly simplified by the formulation of clear rules or presumptions that test the reasonableness of the government's position by reference to objective indicia." Underwood Petition at 9. This Court has provided exactly such criteria for assessing the impact on awards under various fee-shifting statutes of a party's failure to succeed on all issues and claims. Hensley v. Eckerhart, 461 U.S. 424 (1983). We urge

the Court to affirm the applicability of those criteria to the EAJA.[4]

In Hensley, the Court formulated three principles. First, a prevailing party is entitled to fees for all hours reasonably expended in producing a victorious result, even if "the plaintiff failed to prevail on every contention raised in the lawsuit," id. at 435, or to "receive all the relief requested." Id. at 436 n.11. The test is whether "the relief obtained justified [the total]

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4. Although Hensley arose under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, the Court stated that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.7. The EAJA, of course, is such a statute.

expenditure of attorney time." Id. at 436 n.11.

Second, the prevailing party is not entitled to fees for time expended on unsuccessful claims that are "distinct in all respects from his successful claims . . . ." Id. at 440. In that case, the "unrelated claims [must] be treated as if they had been raised in separate lawsuits" to implement "[t]he congressional intent to limit awards to prevailing parties . . . ." Id. at 434-35.

On the other hand, because the presentation of unrelated claims is likely to be the exception rather than the rule, Hensley lastly emphasizes that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his

attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U.S. at 440 (emphasis added).

> "It may well be that cases involving . . . unrelated claims are unlikely to arise with great frequency. . . . In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. . . .
>
> ". . . . Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Id. at 435 (emphasis added).

The district court below expressly followed Hensley in awarding fees to the Battles Farm projects (App. at 26a), and the reversal by the Court of Appeals is flatly inconsistent with

the principles adopted in that decision. An explicit holding by this Court that the district court properly applied Hensley would clarify litigation under the EAJA and serve the central statutory aims to deter and provide compensation for unreasonable government conduct.

4. The proper standard of review of "substantial justification" determinations under the EAJA also is an issue on which the circuits are in conflict. Compare, e.g., Underwood, supra, 761 F.2d at 1346 (abuse-of-discretion standard), with Dubose, supra, 761 F.2d at 917 (de novo review), and Spencer v. NLRB, supra, 712 F.2d at 563-64 (same). This conflict affects judicial review of virtually every EAJA case and thus merits the attention of this Court.

Moreover, the de novo standard followed by the court below to reverse a fee award is incorrect. It is critical to the effective functioning of the EAJA that small business concerns be able to rely on district court fee awards. The EAJA generally limits hourly fees to $75, see 28 U.S.C. § 2412(d)(2)(A), so that small business concerns are likely to lose money in defending against a fee appeal by the government. Indeed, the government maintains that the EAJA does not compensate litigants at all for time spent in opposing reasonable positions by the government on fee issues.[5] These limitations, coupled with the

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5. See, e.g., Cornella v. Schweiker, 741 F.2d 170 (8th Cir. 1984). But see, e.g., Cinciarelli v. Reagan, 729 F.2d 801, 809-10 (D.C. Cir. 1984).

government's superior resources, force private EAJA litigants constantly to reconsider the wisdom of prosecuting fee applications. By requiring these parties in effect to win twice -- once before the district judge who heard the case on the merits and then again before a circuit panel -- the de novo standard of review aggravates the difficulties in obtaining EAJA fees and thus tends to undermine the statute.

These considerations have particular force in this case. Here, the court of appeals not only scrutinized the district court fee award through the prism of de novo review, but also seized on a theory never before advanced by the government to overrule the trial judge. That upset the reasonable expectations of the Battles

Farm projects, not only, we submit, to their substantial detriment, but also to the detriment of the congressional purpose in enacting the EAJA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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